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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JEONG SOOK DOKKO,

Plaintiff and Respondent,

v.

TAE S. KIM,

Defendant and Appellant.

A151303

(Alameda County  
Super. Ct. No. HG13691017)

On August 7, 2013, Jeong Sook Dokko filed a complaint alleging that Tae S. Kim, an owner of codefendant Westcoast Foods, Inc., failed to pay her overtime and to provide meal and rest breaks, itemized statements on wages paid in cash, and wages upon termination, in violation of Labor Code sections 202, 203, 226, 226.7, 510. The complaint also alleged that Kim violated the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq.)

On March 15, 2017, after a two-day bench trial at which Dokko and Kim were the only witnesses who testified, the Honorable Dennis Hayashi entered judgment in favor of Dokko, directing that she recover restitution in the amount of \$141,712.50 from Kim, who was jointly liable with codefendants Westcoast Foods, Inc. and Tae Chul Kim.<sup>1</sup> After finding the testimony of Dokko “credible” and that of Kim “not credible,” the court

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<sup>1</sup> Tae Chul Kim, apparently co-owner of Westcoast Foods, Inc., did not appear at trial and a default judgment was entered as to him. In his opening brief, appellant Kim represents that Tae Chul Kim, who is his brother, has been “deported to South Korea,” and Westcoast Foods, Inc. has been “dissolved.”

concluded that Kim violated the wage and hour provisions of the Labor Code cited above, and that such violations also constituted an unfair labor practice under the UCL. (*Cortez v. Purolater Air Filtration Products Co.* (2000) 23 Cal.4th 163.)

This appeal presents a single issue: whether the trial court erroneously denied Kim a jury trial. Finding that the original and “corrective” briefs filed by Kim in this appeal do not comply with the California Rules of Court<sup>2</sup> and advance unintelligible arguments, we shall dismiss the appeal.

## **BACKGROUND**

### ***Relevant Proceedings Below***

On April 5, 2017, Kim moved for a new trial on the ground, among others, that he “was prevented from having a jury trial.” In his memorandum of points and authorities in support of the motion, and in an attached declaration, Kim stated that “the parties requested a jury trial upon commencement of this present litigation,” and he “was not aware of any proceedings prior to trial in which he waived his rights to a jury trial.” Neither Kim’s memorandum nor his declaration cites or refers to any document in the record supporting these statements.

In a declaration filed in opposition to Kim’s motion for a new trial, Dokko’s counsel filed a declaration stating, as material, that “[a]ll the Case Management Statements filed by [Kim’s] attorney Tae W. Oh before his unfortunate passing in early April 2015, never requested a jury trial.” All of the seven case management statements filed in the case on behalf of Kim were attached to counsel’s declaration, as were numerous other documents submitted by the parties to each other and the court prior to trial.<sup>3</sup> In none of the documents submitted by or on behalf of Kim is there any request by Kim for a jury trial. Dokko’s counsel’s declaration also states that at a pretrial

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<sup>2</sup> Further rule references are to the California Rules of Court.

<sup>3</sup> On March 15, 2018, Dokko moved to augment the record by including the seven case management statements filed by Kim in the superior court. On April 13, 2018, we took the motion under submission to decide with the merits of the appeal. The motion is hereby granted.

conference on November 11, 2016, “I informed the court that the trial will be a bench trial because nobody posted the jury fee.” Counsel’s declaration also states that on “the morning of trial, when I was at the window of filing clerk, defendant Kim approached me and asked whether the trial was going to be a jury trial. I responded that it would be a bench trial and I reminded him that I informed the court and him at the pre-trial conference on 11/1/2016. Defendant Kim did not reply.” Dokko’s counsel represented to the trial court that “[f]rom the commencement of this case until the morning of trial, defendant Kim never announced that a jury is required and never paid [a] jury fee.”

After a hearing, the court denied Kim’s motion for a new trial on April 28, 2017. On May 15, 2017, Kim filed a notice of appeal from that ruling.

The only evidence before the court relating to Kim’s claim that he timely requested a jury trial are the complaint, which does not request a jury trial, the case management statements filed by Kim, which also include no request for a jury trial, and the settled statement certified by the court due to the absence of a reporter’s transcript of any pertinent trial court proceedings. The only language in the eight-page settled statement relating to Kim’s appellate claim are contained in the following four sentences, which all appeared under the title “Defendant Tae S. Kim’s statement regarding trial by jury”: “At the start of trial on March 6, 2017, Defendant Kim inquired whether this matter would be tried by a jury. Plaintiff’s counsel stated that Defendant Kim was informed at the pretrial conference on 11/1/2016 that the case would be a bench trial due to non-payment of jury fees. Defendant Kim stated that he had expected a jury trial. Honorable Dennis Hayashi explained to Defendant Kim that any party who demands a jury trial must pay the required jury fee in advance.”

None of the evidence in the record indicates Kim or counsel acting in his behalf ever requested a jury trial, or paid a jury fee, or asked the court to exercise its discretion to permit Kim to belatedly pay the jury fee.

## II.

### *Relevant Proceedings in this Court*

Kim filed his first opening brief in this appeal in propria persona on February 21, 2018.<sup>4</sup> A week later, March 1, Dokko moved to strike the brief on the ground it violated rule 8.204. Kim filed no opposition and on April 11, 2018, we struck Kim's brief and directed him to file a corrected opening brief in compliance with the rules, specifically rule 8.204(a)(1)(C), 8.204[(a)(2)(C) and 8.204(d). Kim filed a corrected brief on May 1.

On May 11, 2018, Dokko moved to dismiss this appeal on the ground that the corrected brief was also defective in that, again in violation of requirements set forth in rule 8.204, it failed to provide record cites in support of factual statements, failed to provide a summary of facts limited to those supported by the record, and failed to present pertinent or intelligible argument.<sup>5</sup> The motion argued that crucial assertions in Kim's "corrected" opening brief—namely, that demands for a jury trial were set forth in the pleadings of both parties, and he received no timely notice from the court that he had not paid that fee—were unsupported by citations to the record. The motion to dismiss also claimed that Kim's argument the trial court erred in failing to exercise its discretion to allow Kim to belatedly pay the jury fee and grant his request for a jury trial is unintelligible, and that Kim never asked the court to exercise discretion to allow him to belatedly file the jury fee. The gist of the motion to dismiss the appeal was that, because the record includes no evidence Kim ever demanded a jury trial prior to the agreed upon trial date, or sought permission of the court to file the jury fee belatedly, Kim's incoherent claim should not be judicially entertained. Dokko subsequently filed her respondent's brief on July 2.

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<sup>4</sup> All Kim's pleadings in this appeal were filed in propria persona.

<sup>5</sup> The May 11 motion was unaccompanied by a certificate of interested entities or persons and a default entered on that date stated that we would strike the filing if the certificate was not filed within 15 days. On May 14, Dokko filed the certificate, thereby curing the default.

Kim initially did not oppose Dokko's motion to dismiss, and we granted the motion and dismissed the appeal on July 11, 2018. However, claiming he was "unaware" of the motion, Kim filed a "motion to set aside and vacate dismissal" on July 25, 2018. Relying on Code of Civil Procedure section 473, subdivision (b), Kim argued that the dismissal should be set aside because it "was entered as a result of [his] inadvertence and excusable neglect."

On August 6, 2018, we vacated our July 11 order dismissing the appeal, restored the appeal to active status, and set a due date for Kim to file his reply to Dokko's respondent's brief.

### **DISCUSSION**

As relevant here, the constitutional right to a jury trial may be waived "[b]y failing to announce that a jury is required, at the time the cause is first set for trial" if, as here, trial "is set upon notice or stipulation," or "[b]y failing to timely pay the [jury] fee, unless another party on the same side of the case has paid that fee." (Code Civ. Proc., § 631, subds. (f)(4), (f)(5).)

Kim's opening brief states that "[d]espite triable issues of fact regarding the wage and hour claims, . . . and whether Appellant/Defendant (one of three defendants) was even a [proper party], the Superior Court ruled that it would proceed as a bench trial - notwithstanding that the parties had originally requested a jury trial." However, as indicated, Kim has failed to identify anything in the record showing that he or his former attorney (or Dokko) ever made such a request. Indeed, the settled statement, which Kim inexplicably relies upon, makes clear such a demand was never timely or even belatedly made by Kim or any other defendant.

The settled statement represents that Judge Hayashi explained to Kim "that any party who demands a jury trial must pay the required jury fee *in advance*," and he had not done so. The settled statement also indicates that, upon learning from the court of his (assertedly inadvertent) omissions, Kim did not ask the court, "in its discretion upon just terms, [to] allow a trial by jury although there may have been a waiver of a trial by jury," as he could have done. (Code Civ. Proc., § 631, subd. (g).)

Although the rules prescribing the procedures for appellate courts to follow on the filing of a defective brief do not expressly authorize the court to dismiss an appeal for failure to file a brief that conforms with the rules, and no statute or rule specifies the procedure to follow on the striking of an appellant's initial brief and the subsequent filing of a brief that also fails to conform with the rules, an appellate court possesses inherent discretionary power to dismiss the appeal following the filing of the second defective brief. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1118-1119.) Additionally, the "failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal." (*Id.* at p. 1119, citing *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706.)

Kim's original and subsequent briefs do not comport with the rule mandating that an appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record" (rule 8.204(a)(2)(C)), because the portion of the record he refers to—the certified settled statement—does not support his factual allegations. Additionally, Kim's reply brief contains no citation to the record in support of any of its factual allegations, as required by rule 8.204(a)(1)(C), and no proper citation of any legal authority. Finally, because they have no basis in the record, the arguments set forth in all of Kim's briefs are unintelligible. His briefs merely iterate and reiterate in conclusory fashion that he timely requested a jury trial and, even if he did not, he should have been authorized to pay the fee at the time of trial. As we have said, Kim has not identified anything in the record indicating either that he timely requested a jury trial or that he sought leave of the court to pay the jury fee belatedly. As we stated in *Berger v. Godden*, *supra*, 163 Cal.App.3d at page 1119, an appellate court is not required to consider alleged error "where the appellant merely complains of it without pertinent argument."

For the foregoing reasons, the appeal is dismissed.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

*Dokko v. Kim* (A151303)